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IN THE

# Supreme Court of the United States

**October Term, 1961**

**No. 777**

PEOPLE *ex rel.* MORRIS FRIEDBERG,
*Relator-Appellant,*

*against*

HENRY SILBERGLIT, Warden of the City Prison, Borough of Manhattan,
*Respondent-Appellee.*

## MOTION TO DISMISS OR AFFIRM

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## MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

NOW COMES THE APPELLEE in the above entitled cause and moves the appeal be dismissed or, in the alternative, that the final judgment appealed from be affirmed.

### Statement

This is an appeal from a final order of the New York Court of Appeals, entered November 16, 1961, denying the appellant leave to appeal to the said court from an order

of the Appellate Division of the Supreme Court of New York, entered May 31, 1961, which unanimously affirmed, without opinion, an order of the New York Supreme Court, County of New York, Special Term Part II (SPECTOR, J.), dated June 14, 1959, dismissing, after a hearing, a writ of habeas corpus brought by the petitioner to test the validity of his extradition to the State of Michigan.

## The Facts

The State of Michigan sought the extradition of the relator pursuant to Section 834 of the New York Code of Criminal Procedure, alleging, by complaint and supporting affidavits, that the relator had committed acts in the State of New York intentionally resulting in a crime in the State of Michigan, which acts would be punishable under the laws of New York had the consequences been felt in the latter jurisdiction.

Specifically, the complaint, executed by John L. Drummy before a Justice of the Peace for Macomb County, Michigan, alleged, in substance, that the relator, with intent to defraud, made false statements and executed a check for over $100, which was returned for insufficiency of funds. Further, the complaint alleges that the relator obtained shipment of six new Oldsmobile cars valued at approximately $20,000 by means of false pretenses (*ibid.*). In addition, the amended affidavit of Hon. Cecil A. Byers, the prosecuting attorney of the said Macomb County, sets forth in detail the factual allegations upon which his application for the relator's extradition is founded. There, the transactions between the relator and Drummy Oldsmobile are fully narrated.

At the hearing, the testimony of the only witness recounted, a telephone order placed by the relator for certain automobiles on which he agreed to make an initial payment of $5,000. The relator's check for that amount was received and the cars immediately released for transport to New York. At the time the $5,000 check in question was drawn, the relator had $45.58 on deposit in his bank.

## Pertinent New York Statutes Involved

### Code of Criminal Procedure

**Section 834.** Extradition of persons not present in demanding state at time of commission of crime.

The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section eight hundred and thirty with committing an act in this state or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; and the provisions of this title, not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom; * * *

## Penal Law

**Section 1292-a.** Issuing fraudulent check, draft or order; how punished.

Any person who, within intent to defraud, shall make or draw or utter or deliver any check, draft or order for the payment of money either in his own behalf or in behalf of any other person, or as an agent or representative of another or as an officer or agent of a corporation or purporting to be such agent, representative or officer, upon any bank or other depositary, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depositary for the payment of such check, although no express representation is made in reference thereto, shall be guilty of a misdemeanor; and if money or property is obtained from another thereby is guilty of larceny and punishable accordingly. In any prosecution under this section as against the maker or drawer the proof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee because of lack of funds or credit, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depositary. * * *

**Section 1293-b.** Obtaining property or credit by use of false statement.

Any person:

Who shall knowingly make or cause to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay, of himself, or any other person, firm or corporation, in whom he is

interested, or for whom he is acting, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable, the execution, making or delivery by any person, firm or corporation of any bond or undertaking, or the making, acceptance, discount, sale or indorsement of a bill of exchange, or promissory note, for the benefit of either himself or of such person, firm or corporation;

* * *

Shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or both fine and imprisonment.

## I

## There is no substantial question presented.

Since the proof clearly showed the commission of a crime both under the laws of the demanding and rendering states, the discretionary power of rendition was properly exercised by the Governor of the State of New York pursuant to Section 834 of the New York Code of Criminal Procedure.

The relator attempts to construct a Federal question by claiming that the issue at the hearing held on his writ of habeas corpus to test the validity of the extradition was unduly limited, resulting in a denial of due process of law under the Fourteenth Amendment to the United States Constitution. Utterly barren of support, the relator's argument challenges as well the constitutionality of the

pertinent section of the Uniform Extradition Act. As incorporated in Section 834 of the New York Code of Criminal Procedure, the relator considers the provision defective for failing to "delineate or define the requisite proof necessary to satisfy its interdictions."

With respect to his first contention, stated in a single naked sentence (brief, p. 3), it is clear that the proof adequately established that the acts charged would be deemed criminal under the laws of New York. At the very least, the fraudulent making and uttering of check with knowledge of the gross insufficiency of the funds on deposit constitutes the New York misdemeanor of violation of Section 1292-a of the Penal Law (*supra*, p. 4). Since the automobiles were obtained thereby, the same Section makes the act punishable as larceny. Needless to add, the relator offered no evidence to overcome the presumption of his knowledge of the insufficiency of funds and concomitant intent to defraud created by the statute itself. In urging this point, the relator abandons his argument below wherein he tacitly conceded that his acts would be criminal in New York under Sections 1292-a and 1293-b of the New York Penal Law and concentrated his attack on an alleged lack of proof of the elements of criminality under the law of the demanding state, Michigan. This latter contention is not raised in the instant appeal.

Concerning the relator's second contention, a reading of the statute itself reveals its admirable clarity and specificity. There can be no doubt whatever of the requisite elements for the issuance of a valid warrant of rendition, in the exercise of gubernatorial discretion, where a wrongdoer commits an act in one state resulting in a crime in another.

This provision, adopted to supplement the Constitutional mandate for the return of fleeing fugitives, requires a showing of two simple elements. First, the act of the wrongdoer must "intentionally result" in a crime in the demanding jurisdiction. Second, the conduct, if it had been consummated in the asylum state, must be "punishable under its laws."

Notably clear, the elements were fully complied with in the instant case.

## Conclusion

For the foregoing reasons, the appeal should be dismissed, or in the alternative, the order of the court below dismissing the relator's writ of habeas corpus and rendering him to the authorities of the demanding state, should be affirmed.

Respectfully submitted,

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